

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

IRFAN GOKEE,

Plaintiff,

v.

A. NEIL CLARK *et al.*,

Defendants,

Case No. C08-5292FDB

REPORT AND
RECOMMENDATION

**NOTED FOR:
JULY 18, 2008**

This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4. Before the court is plaintiff's motion asking for immediate release from custody at the Northwest Detention Center (Dkt # 3). Plaintiff is a detainee facing deportation. This action is still in the initial stages and plaintiff has not been granted *in forma pauperis* status. The court is waiting for plaintiff to cure the defects in his application (Dkt. # 2). The complaint alleges failure to protect, and failure to provide adequate medical treatment after an assault by other detainees.

In his motion plaintiff asks for release from custody so he can litigate this action. Plaintiff's motion must be **DENIED**.

When an incarcerated person is challenging the very fact or duration of his physical imprisonment, and

1 the relief he seeks will determine that he is or was entitled to immediate release or a speedier release from that
 2 imprisonment, his sole federal remedy is a writ of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475, 500
 3 (1973). In June 1994, the United States Supreme Court held that "[e]ven a prisoner who has fully exhausted
 4 available state remedies **has no cause of action under § 1983 unless and until the conviction or**
 5 **sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus.**"
 6 Heck v. Humphrey, 512 U.S. 477, 487 (1994)(emphasis added). The court added:

7 Under our analysis the statute of limitations poses no difficulty while the state challenges are
 8 being pursued, since the § 1983 claim has not yet arisen. . . . [A] § 1983 cause of action for
 9 damages attributable to an unconstitutional conviction or sentence does not accrue until the
 conviction or sentence has been invalidated.

10 Id. at 489. "[T]he determination whether a challenge is properly brought under § 1983 must be made based
 11 upon whether 'the nature of the challenge to the procedures [is] such as necessarily to imply the invalidity of
 12 the judgment.' *Id.* If the court concludes that the challenge would necessarily imply the invalidity of the
 13 judgment or continuing confinement, then the challenge must be brought as a petition for a writ of habeas
 14 corpus, not under § 1983." Butterfield v. Bail, 120 F.3d 1023, 1024 (9th Cir.1997) (*quoting Edwards v.*
 15 Balisok, 520 U.S. 641 (1997)) .

16 Plaintiff cannot seek release from confinement in a Civil Rights Action. The court recommends the
 17 motion be **DENIED**. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil
 18 Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See*
 19 *also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of
 20 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the
 21 clerk is directed to set the matter for consideration on **JULY 18, 2008**, as noted in the caption.

22 DATED this 23 day of June, 2008.

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 24 /S/ J. Kelley Arnold
 25 J. Kelley Arnold
 26 United States Magistrate Judge
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